

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15**

**New Orleans, Louisiana**

**TMSEL – TRANSIT MANAGEMENT OF SOUTHEAST  
LOUISIANA**

**Employer**

**and**

**Case No. 15-UC-150**

**LOCAL 100, SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU), AFL-CIO**

**Union/Petitioner**

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, in New Orleans, Louisiana, on February 3 - 4, 2004, and on April 16, 2004. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>1</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. Transit Management of Southeast Louisiana, hereinafter the Employer, is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The Parties have stipulated that the Employer is subject to the jurisdiction of the Board.
3. The parties have stipulated that Local 100, Service Employees International Union (SEIU) AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties entered into a collective-bargaining agreement (hereinafter CBA) on June 19, 2003, effective from June 1, 2003 to December 31, 2005.

**I. Procedural History**

On January 30, 2002, in Case No. 15-RC-8381, the Petitioner filed a petition seeking to represent certain employees of the Employer. Though not made part of the record, I take administrative notice of the proceedings in regards to this petition, and note that in the petition the Petitioner sought to represent "[a]ll eligible full-time and part-time employees not currently represented in the following divisions and departments: [followed by a list of particular classifications and departments]." Excluded from the bargaining unit that Petitioner sought to represent, in addition

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<sup>1</sup> The positions of the parties as stated at the hearings and in their briefs have been duly considered.

to supervisors and guards as defined by the Act, were “[a]ll eligible employees not currently represented within the division of operations with the exception of those employed in the department of Penske Contract management,” and any employees covered by an existing collective-bargaining agreement.

On February 22, 2002, in Case No. 15-RC-8381, the Acting Regional Director of Region 15 approved a Stipulation for Certification Upon Consent Election Agreement entered into by the parties (hereinafter called Stipulated Election Agreement). Taking administrative notice of the Stipulated Election Agreement, I note that the parties agreed that the election would involve Voting Group A, a unit of all full-time and regular part-time office clerical employees, and Voting Group B, a unit of all full-time and regular part-time professional employees, and for the ballots cast by Voting Group A and Voting Group B to be counted together in the event a majority of the professional employees indicated their wish to be included in a unit with nonprofessional (office clerical) employees. The Stipulated Election Agreement contained provisions unique to each voting group that excluded certain named individuals and classifications as having confidential/managerial or supervisory status. The Stipulated Election Agreement also contained provisions unique to each voting group that provided for the inclusion of specific departments, individuals and classifications. The general classifications of confidential employees, managerial employees, guards, street supervisors and “other individuals employed as supervisors under Section 2(11) of the Act” were excluded from each voting group. Glenda Johnson (as Marketing Representative (Sales Representative)) was to vote subject to challenge based upon the Employer’s position that she was a managerial employee, her eligibility being in question as a member the office clerical voting unit. Donald Hyde (as Special Contract Administrator) was to vote subject to challenge based upon the Employer’s position that he was a managerial employee, his eligibility being in question as a member of the professional voting unit. The Stipulated Election Agreement also included language by which the parties agreed that for each voting group, with the exception of those individuals to vote subject to challenge (namely Glenda Johnson and Donald Hyde), that “they [were] making disposition of all questions of eligibility and that this resolution [was] final and binding on them.” The election was conducted on March 15, 2002. On March 28, 2002, the Region issued a Certification of Representative (Certification), certifying the Petitioner as the exclusive collective-bargaining representative in a unit consisting of “All full-time office clerical employees (Voting Group A) and professional employees (Voting Group B).” The eligibility factors discussed above, which were made a part of the Stipulated Election Agreement, appear as an attachment to the Certification.<sup>2</sup>

On January 16, 2004, the instant UC petition was filed by the Petitioner. In the petition, the Petitioner attached Article 2, entitled Recognition, of the current collective-bargaining agreement (CBA) to define the unit involved. This language sets forth the contractual bargaining unit (Unit) as follows:

The Company hereby recognizes the right of its employees to bargain collectively through representatives of their own choosing, and recognizes the Union as the sole collective bargaining agent for the employees within the bargaining unit described in the NLRB Certification Order in Case No. 15-RC-8381. The Company hereby recognizes the Union as the exclusive bargaining agent for the following employee classifications: (1) accounts payable representatives, payroll clerks, payroll analysts, senior payables clerks, assistant project managers (program sales coordinators), receptionists, staff assistants, transit analysts, supervisors of transit date, community outreach coordinators, department secretaries, grants receivable clerks, benefits

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<sup>2</sup> A copy of the Certification and the attachment thereto is made a part of this Decision and Order as Attachment A.

specialists I, benefits specialists III, employment recruiting specialists/administration, employment specialists III, legal secretaries, maintenance quality control inspectors, maintenance project coordinators, department secretaries, products expeditors, marketing representatives (sales representatives/transit products), contract expeditors, buyers, safety representatives; and (2) general ledger accountants, senior property accountants, senior budget analysts, construction specialists, managers of planning, transit development coordinators, transit planners, grants specialists, senior grants specialists, senior internal auditors, microcomputer specialists, systems analysts II, special contract administrators, and contract administrators employed by the Company; but excluding: (1) all probationary personnel as defined in Section 2(1) and 2(b) of this Article, (2) all confidential employees, managerial employees, guards, street supervisors and other individuals defined as supervisors under Section 2(11) of the National Labor Relations Act; and (3) all bargaining unit employees represented by the Amalgamated Transit Union, Division 1560 and the International Brotherhood of Electrical Workers, Local 1700-4.

To the extent that the Unit may differ from the unit set forth in the Certification, this variance does not involve any individuals or classifications that were litigated during the course of the unit clarification hearing.

## **II. Positions of the Parties and Prevailing Case Law**

At the hearings and in its briefs, the Employer asserted that the unit clarification petition was filed untimely. The Employer claims that it reserved its right to petition to clarify the Unit, but that Petitioner did not. Petitioner claims that it reserved its right to petition to clarify the Unit but makes no assertion regarding the Employer. For the reasons stated below, I find that both the Employer and Union reserved their right to raise unit clarification issues via a unit clarification petition.

The Board generally declines to clarify a bargaining unit during the mid-term of a collective-bargaining agreement that clearly defines the bargaining unit. *Wallace-Murray Corp.*, 192 NLRB 1090 (1971); *Edison Saulk Electric Company*, 313 NLRB 753 (1994). To do otherwise, the Board has held, would be unnecessarily disruptive of an established bargaining relationship. *San Jose Mercury & San Jose News*, 200 NLRB 105 (1972); *Wallace-Murray*, 192 NLRB at 1090. In other words, the Board has held that to permit clarification during the course of a contract would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition. *San Jose Mercury & San Jose News*, 200 NLRB at 106. If, however, a party reserved its right to file a clarification petition, the Board will process it. *Edison Saulk Electric Company*, 313 NLRB at 753.

Even if a party has not reserved its right to file a clarification petition, in certain limited circumstances the Board has determined that the interests of stability are better served by entertaining a clarification petition during the term of the collective-bargaining agreement. For example, when a union and employer cannot come to an agreement that a disputed classification should be included in the unit but do not wish to press that issue at the expense of reaching a collective-bargaining agreement, the Board will entertain a unit clarification petition filed shortly after the collective-bargaining agreement is executed, absent an indication that the petitioner abandoned its request in exchange for some concession in negotiations. *WYNS-TV (WIXT)*, 239 NLRB 170 (1978); *Massey-Ferguson, Inc.*, 202 NLRB 193 (1973). For example, in *Massey-Ferguson*, the union did not desire to hold up contract negotiations over the inclusion of a disputed classification of employees, and advised the employer that it would pursue the matter "through legal channels" after the negotiations. Shortly

after the collective-bargaining agreement was executed, the union filed a clarification petition, and the Board clarified the unit to include the disputed classification, absent an indication that the petitioner had abandoned its desire to clarify the position in exchange for some concession in negotiations.

Also, a unit clarification petition filed during the term of a collective-bargaining agreement is appropriate when there is a question concerning the placement of a newly created classification. See *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166 (2001) and *Crown Cork & Seal Company*, 203 NLRB 171 (1973). Further, clarification of a bargaining unit during the term of a collective-bargaining agreement is appropriate when a position “has undergone recent substantial changes so as to create doubt regarding whether that classification should be accreted to an existing unit.” *Robert Wood Johnson University Hospital*, 328 NLRB 912, 914 (1999).

In determining whether the bargaining unit should be clarified, the Board has followed a restrictive policy in finding accretions to existing units in order to preserve the right of employees to choose their own bargaining representative. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001); *Towne Ford Sales*, 270 NLRB 311 (1984), *enfd.* 759 F.2d 1477 (9<sup>th</sup> Cir. 1985). Thus, in *Melbert Jewelry Co.*, 180 NLRB 107 (1969), the Board emphasized that it will not, under the guise of accretion, compel a group of employees to be included in one overall unit, “without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.” The Board will not find an accretion when the employee group in question would constitute a separate appropriate bargaining unit. *Passavant Health Center*, 313 NLRB 1216 (1994). Rather, the Board will permit accretion to promote labor relations stability only if the new employees have such a strong community of interest with members of an existing unit that the new employees would have been included in the unit or covered by the contract. *United Parcel Service*, 303 NLRB 326, 327 (1991), *enfd.* 17 F.3d 1518 (D.C. Cir. 1994), *cert denied*, 513 U.S. 1076 (1995). See also *Archer Daniels Midland Co.*, *supra*.

When determining if the new employees share a community of interest with the employees of an existing bargaining unit, the Board considers: the integration of operations; centralization of management and administrative control; geographical proximity; similarity of working conditions, skills, and functions; collective-bargaining history; and the interchange of employees. *Archer Daniels Midland Co.*, *supra*; *Silver Court Nursing Center, Inc.*, 313 NLRB 1141, 1142 (1994). The factors normally viewed as the most important are employee interchange and common day-to-day supervision. *Super Valu Stores*, 283 NLRB 134, 136 (1987).

It should be noted, however, that the Board has found that an accretion analysis should not be applied if it is established that a new classification is performing the same basic functions a unit classification historically performed. In that situation, the new classification is properly viewed as belonging in the unit rather than being added to the unit by accretion. *Developmental Disabilities*, 334 NLRB 1166, 1168 (2001); *Premcor, Inc.*, 333 NLRB 1365 (2001).

The Board has also found that mid-term unit clarification is appropriate to exclude a group of employees whose inclusion is contrary to law. *Kirkhill Rubber Company*, 306 NLRB 559 (1992).

Finally, the petitioning party has the burden of establishing that clarification is appropriate. *Washington Post Company*, 256 NLRB 1243, 1245 (1981).

### **III. Analysis**

I find that Petitioner reserved its right to file a petition to clarify the Unit. Testimony of both Darrell Brown, the Employer’s Deputy General Counsel, and Wade Rathke, Petitioner’s Chief

Organizer, make clear that both parties disputed the appropriateness of including various employees in the Unit and discussed the matter on at least two occasions. Eventually, they concluded they would not immediately reach a resolution. Because the parties did not want to delay signing the CBA, the parties agreed to continue negotiating and devise a procedure by which they would determine whether employees would be included in the bargaining unit. This agreement was memorialized in a letter from Brown to Rathke, dated June 19, 2003, that stated the following:

The parties agree that they will negotiate during the first year of the above-referenced Collective Bargaining Agreement, a procedure for determining when and if a Company employee who is newly hired, transferred, reassigned or who assumes different job responsibilities is to be included as a member of the bargaining unit. The procedure will include an orderly manner in which to address issues in a pre-arbitration, pre-arbitration and pre-clarification (with NLRB) fashion.

(hereinafter known as the Side Agreement). However, the parties were not able to devise such a procedure and, consequently, the Union sought clarification of the Unit by the Board.

The Board prohibits a party from petitioning to clarify a unit during the course of a collective-bargaining agreement because to allow otherwise would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition. However, Board law allows such a petition if the party reserved its right to file it, in effect, putting the other party on notice that the petition is forthcoming and that the unit's definition has not been agreed upon. In this matter, the Union persistently insisted that the disputed positions be included in the Unit, stopping short of explicitly reserving the right to pursue a formal Board proceeding only because the parties entered into the Side Agreement intended to resolve the dispute. Upon the failure of that agreement, the Employer cannot now claim the Unit's definition was agreed to, or that it was unaware that the Union intended to seek the inclusion of the disputed employees. Further, although the Employer asserts that the June 13, 2003 agreement reserved only the Employer's right to pursue this matter with a unit clarification petition, I find that the clear language of the agreement as well as the Union's position during the negotiations support the fact that, at the time the collective bargaining agreement was signed, both parties were aware that there were issues outstanding regarding the composition of the Unit and that the parties would continue to negotiate over these issues prior to pursuing alternative methods. Therefore, I find that the substance of the negotiations and the Side Agreement signed on June 13, 2003, acted as an implicit reservation of the Union's right to petition to clarify the Unit.

On the chance that I would find the petition was timely filed, the Employer took the position that only those employees who were actually discussed prior to the signing of the CBA may be clarified. While both parties agreed that some employees were discussed, there is a dispute over whether others were discussed. In regard to the employees named in the clarification petition, the parties agree that the inclusion/exclusion of the following employees was discussed before the CBA was signed on June 19, 2003:

Stephanie Carson  
Karen Barnes  
Barbara Wheat

Sylvia Haughton  
Caramitter Carter

However, in regard to the remaining employees named in the petition, the parties cannot agree on when, or if, they were discussed. While the Union claims the employees were discussed before the CBA was signed, the Employer claims they were either not brought up until after the CBA was

signed, or not at all. Under the facts of this case, as explained below, I find that it is not relevant whether a particular position (or employee) was specifically named.

According to the unrefuted testimony of Rathke, the Employer was in an ongoing process of reorganizing departments, transferring and renaming positions, and reassigning duties. Under these circumstances, identifying a particular job title would have little meaning; a position that was discussed prior to the signing of the CBA may be renamed after the agreement was signed. While it is not clear which positions were discussed, it is clear there was considerable confusion and disagreement as to which positions were included in the Unit, which, as I found above, Petitioner intended to resolve. Given this, and given the broad language of the Side Agreement in which the parties agreed to devise their own clarification procedure, I find that the Employer was put on sufficient notice that Petitioner would be seeking clarification of a number of Unit positions. Therefore, I find that the petition was timely filed in regard to any position that was arguably in existence before the signing of the collective-bargaining agreement on June 19, 2003.

#### **IV. Clarification of the Unit**

##### **A. Location of The Employer's Facilities**

The Employer has several facilities located throughout the New Orleans area. The facilities at issue in this matter are the Employer's main administrative offices located at 6700 Plaza Drive in the eastern area of New Orleans; the East New Orleans facility, located on Desire Parkway, approximately 7.5 miles from the Plaza Drive facility; the Canal Street facility, located in the mid-city area of New Orleans and approximately 12 miles from the Plaza Drive facility; and the Carrollton Car Barn, located in the Uptown area of New Orleans and approximately 15 miles from the Plaza Drive facility.

At several places in its brief, Petitioner asserts that an employee should be included in the Unit despite the fact that he or she is not located at the Plaza Drive facility. This suggests that the location of an employee is relevant to his or her inclusion in the Unit. However, nothing in the record or any of the documents of which I have taken administrative notice indicate that the Unit is limited to employees located at the Plaza Drive location. Moreover, the Employer has not put forth the argument that an employee should be excluded based on his or her location. Therefore, except as part of community of interest considerations, I will not consider the physical location of an employee to be determinative of his or her inclusion in the Unit.

##### **B. Employees for Whom Petitioner Reserved its Right to Petition to Clarify the Unit**

Petitioner reserved its right to petition to clarify the Unit in regard to the following employees. As noted above, I found that the petition was filed timely in regard to any position that was arguably in existence at the time the CBA was signed by the parties on June 19, 2003. The evidence indicates that these positions were in existence at that time.

##### **1. Stephanie Carson**

Executive Legal Secretary Stephanie Carson is excluded from the Unit because she is a confidential employee. Ms. Carson is employed as an Executive Legal Secretary in the Legal Affairs Department at the Employer's Plaza Drive facility. She is the secretary for Mark Popkin, the Employer's General Counsel. She has held this position for less than one year (the record is not more

specific). Prior to being an Executive Legal Secretary, she was a Legal Secretary, also for Mr. Popkin. Ms. Carson became Executive Legal Secretary when Mr. Popkin became General Counsel. She considers the change from Legal Secretary to Executive Legal Secretary to be a promotion and she received a raise.

It is Ms. Carson's opinion that the position of Executive Legal Secretary is new and that no one occupied the position before her. However, she admitted that the previous General Counsel's secretary, whose title was Executive Secretary, had duties "similar" to Ms. Carson's present duties as Executive Legal Secretary. (Tr. 35) According to Ms. Carson, there is currently no one with the title of Executive Secretary.

There are currently three other clerical employees in the Legal Affairs Department, two Legal Secretaries and a temporary employee. Ms. Carson claims that her job duties are essentially the same as the Legal Secretaries' duties, and her duties when she was a Legal Secretary, except that she now prepares a variety of reports (on a weekly, quarterly and annual basis) and no longer prepares documents for filing with the courts. In addition, Ms. Carson now attends meetings with the General Counsel and other management officials of the Employer, as well as with representatives of outside organizations (i.e., insurance companies), but there was no testimony as to what her role is at the meetings. In addition, she testified that as the Executive Legal Secretary she assists the General Counsel in "formulating, determining and effectuating the legal aspects of the management policies regarding labor relations," though there was no evidence as to what these activities entailed. (Tr. 35) Ms. Carson also testifies that she holds "confidential discussions" with the General Counsel regarding staffing in the Legal Affairs Department. (Tr. 37) Again, there was no evidence as to what these discussions entailed.

According to Darrell Brown, Deputy General Counsel, testified that Ms. Carson is involved with labor relations matters. According to Mr. Brown, one of his responsibilities is negotiating the Employer's collective-bargaining agreements, and the secretary to the General Counsel generally assists him with that. Also according to Mr. Brown, Ms. Carson is privy to analyses of legal issues surrounding labor relations matters (though no specific details were provided).

According to the Certification of Representative, Ms. Carson is expressly named as a member of the Unit, as are the Legal Affairs Department and the Legal Secretary classification. The Executive Legal Secretary position is not mentioned in the certification but Donna Bowman, as the Executive Secretary, is specifically excluded from the Unit as a managerial/confidential employee.

Petitioner takes the position that Ms. Carson should be included in the Unit because she was expressly named as a member of the Unit. Petitioner claims that the word "Executive" was added to her title solely because the individual she works for, Mr. Popkin, was promoted from a general staff attorney to General Counsel. Petitioner also asserts that Ms. Carson did not take on any additional duties, or take on any supervisory responsibilities that would require her removal from the Unit, or that she was involved with labor relations in any manner, which also would have required her removal from the Unit.

The Employer takes the position that Ms. Carson should be excluded from the Unit because, as the secretary to the General Counsel, she is a confidential employee. The Employer makes this assertion based on the nature of the information that she handles and generates. Also, the Employer claims that the previous secretary to the General Counsel was excluded as a confidential employee and, consequently, Ms. Carson should likewise be excluded. I agree with the Employer.

Stephanie Carson, as the Executive Legal Secretary, is excluded from the Unit. It is appropriate to clarify a Unit to exclude an employee if that classification of employee is excluded by law. *Kirkhill Rubber Company*, 306 NLRB 559 (1992). The Board has consistently excluded confidential employees from bargaining units. *B.F. Goodrich Company*, 115 NLRB 722, 724 (1956). The Board defines a confidential employee as an employee who “assist[s] and act[s] in a confidential [relationship] to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *Id.* Ms. Carson testified that, as the secretary to the General Counsel, she assists the General Counsel in “formulating, determining and effectuating the legal aspects of the management policies regarding labor relations.” Mr. Brown testified that Ms. Carson is privy to analyses of legal issues surrounding labor relations matters. While there were no specific details given to illustrate the nature of this assistance, I note that Petitioner provided no evidence to contradict the testimony. Moreover, according to Mr. Brown, Ms. Carson will be assisting him with negotiating collective-bargaining agreements (as is customary for the secretary to the General Counsel). Given Ms. Carson’s confidential role in labor relations matters, I find that she is a confidential employee and excluded from the Unit.

Moreover, I find that the position currently held by Ms. Carson, regardless of title, has historically been excluded. In the Certification of Representative, the parties agreed that the position of Executive Secretary would be excluded from the Unit as a confidential employee. At the time, the Executive Secretary was the secretary to the General Counsel. According to Ms. Carson, as Executive Legal Secretary, she performs the same duties that Ms. Bowman performed when she was Executive Secretary. Consequently, I find that, despite the change in title, Executive Legal Secretary and Executive Secretary are the same position. Because the Executive Secretary position was specifically excluded from the Unit as a confidential employee, the Executive Legal Secretary position is likewise excluded from the Unit.

As to Petitioner’s argument that Ms. Carson, despite the change in title, is performing the same job that she performed as a Legal Secretary, the record is unresponsive. Ms. Carson testified that she regards the new position as a promotion, and that when she was promoted she took on additional duties unique to that position. Also, it is not relevant that Ms. Carson was expressly named as a member of the Unit in the certification. Ms. Carson no longer holds the position she held at the time of the certification but, instead, holds a position that, as explained above, is excluded from the Unit. Therefore, I find that the position of Executive Legal Secretary, currently filled by Stephanie Carson, is excluded from the Unit.<sup>3</sup>

## **2. Railynn Holmes and Dolores Joseph**

Clerk-Typist Railynn Holmes and Department Secretary Dolores Joseph are excluded from the Unit because they work in the Transit Operations Department.

Ms. Holmes is employed as a Clerk-Typist in the Transit Operations Department at the Employer’s Canal Street facility. She began working for the Employer as a Clerk-Typist in June of 2002 (after the March 2002 election). Ms. Holmes assists the Manager of Station Operations by typing and filing a variety of reports and documents related to the Transit Operators (the Transit

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<sup>3</sup> In its brief, the Employer asked that I clarify the Legal Secretary classification as confidential. The Employer claims “the current inclusion of legal secretaries in the unit is hindering the free flow [of] labor and employment work throughout the department.” However, the Employer’s desires notwithstanding, nothing in the record indicates that the Legal Secretary classification has changed. Consequently, clarification is not appropriate at this time.



Operators are the bus drivers, streetcar operators, etc.). She also processes documents regarding Transit Operators' attendance (sick leave, worker's compensation, FMLA, etc.), and she screens Transit Operators who go to the office for assistance and helps them if she is able. About three or four times a year, Ms. Holmes goes to the Employer's Carrollton Car Barn to perform the same functions (there are no clerical employees located there). There are no other Clerk-Typists or other clerical employees working with Ms. Holmes in the Transit Operations Department at the Canal Street facility but, according to Ms. Holmes, there is an equivalent position at the East New Orleans facility, currently filled by Dolores Joseph.

According to Dolores Joseph, she is employed as a Department Secretary in the Transit Operations Department at the Employer's East New Orleans facility. Ms. Joseph has been in her current position for 21 years.

Ms. Joseph assists the Manager of Station Operations; her duties consist of typing, answering the telephone, maintaining files pertaining to the Transit Operators (with information regarding traffic violations, accident reports, customer grievances, etc.), and other clerical tasks. For some period of time in 2002 (the record was not clear how long), before Railynn Holmes started working for the Employer at the Canal Street facility, Ms. Joseph traveled between the Canal Street facility and the East New Orleans facility performing her duties (the person holding the position before Ms. Holmes had retired). According to Ms. Joseph, she and Ms. Holmes perform the same functions.

The Petition for election specifically excluded the Transit Operations Department from the bargaining unit. The Certification of Representative does not mention the Transit Operations Department. However, significantly, although the Certification specifically lists several departments as included departments, it fails to list the Transit Operations Department as an included department. Further, it fails to include Ms. Holmes by name (because she was not employed at the time of the election) and does not mention the Clerk-Typist classification. As to Ms. Joseph, a department secretary, while the Certification of Representative lists Department Secretary as an included classification, Ms. Joseph, who was employed at the time of the certification, is not listed by name as an included employee. Also, although the CBA does not mention the Clerk-Typist classification, it does include the Department Secretary classification.

Petitioner takes the position that Ms. Holmes and Ms. Joseph should be included in the Unit because their job duties are identical to other classifications in the Unit. Regarding Ms. Joseph specifically, Petitioner points out that, according to the Certification of Representative, the position of Department Secretary, the position held by Ms. Joseph, is specifically included in the Unit.

However, the Employer claims that Ms. Holmes and Ms. Joseph should be excluded from the Unit because they work in the Transit Operations Department and the Transit Operations Department is not included in the Unit. I agree with the Employer.

Railynn Holmes and Dolores Joseph are excluded from the Unit because they work in the Transit Operations Department and employees in the Transit Operations Department are not included in the Unit. Even if Ms. Holmes and Ms. Joseph are performing the same duties as classifications that are included in the Unit, and, in Ms. Joseph's case, have the same job title as a classification that is included, they do not work in a department that is included in the Unit. The Certification of Representative not only lists the classifications to be included in the Unit, but also lists the departments to be included in the Unit and the employees who were allowed to vote in the election. Specifically listing the departments, classifications, and employees to be included in the Unit must

mean that the parties intended to not include those that were not listed.<sup>4</sup> This conclusion is supported by the fact that Ms. Joseph has held the same position in the Transit Operations Department for 21 years but was not included in the list of employees eligible to vote in the representation election.

Moreover, given that Ms. Joseph and other Transit Operations Department clerical employees were not allowed to vote in the election, their inclusion in the Unit raises a question of representation, not of clarification; they are entitled to a self-determination election so that they may properly express their wishes. See *Roper Corporation Newark Division*, 186 NLRB 487, 438 (1970). To include the Transit Operations Department employees in the Unit now would allow Petitioner to expand the Unit with employees that the Union initially sought to exclude from the process. Therefore, based on the reasons cited above, Ms. Holmes and Ms. Joseph are excluded from the Unit.

### **3. Barbara A. Philips**

Quality Assurance Planner Barbara Philips is excluded from the Unit because I find that she lacks a community of interest with the bargaining unit employees. Ms. Philips is employed as a Quality Assurance Planner in the Capital Improvements Department at the Employer's Plaza Drive facility. While she is based at the facility, her job duties take her around the city on a daily basis. Ms. Philips has been in this position since February 17, 2003, when she returned from sick leave (for six months). From March of 1997 until May of 1998, Ms. Philips was employed as Chief of Staff; from May of 1998 until March of 2002, she was the Director of Lease Maintenance; and From March of 2002 to August of 2002 (when she went out on sick leave), Ms. Philips was the Acting Director of Maintenance. After returning from sick leave on February 17, 2003, Ms. Philips took up her current position as Quality Assurance Planner.

As Quality Assurance Planner, Ms. Philips works for the Quality Assurance Manager, James Baker, who is not an employee of the Employer but an independent contractor. Her primary responsibility is reviewing reports and other documents pertaining to capital improvement work being performed. In doing so, she reviews reports generated by, and work performed by, various outside contractors to make sure that their work complies with requirements of the Federal Transportation Administration. Ms. Philips also reviews internal plans and drafts for content and grammar and assists an outside quality assurance inspection contractor in site audits of all local contractors constructing components for the Canal Streetcar line. According to Ms. Philips, she works independently with Mr. Baker and rarely interacts with other employees of the Employer.

Also included in the Capital Improvements Department are the Department Director, two Engineers, the Secretary, and other employees whom Ms. Philips thinks are planners, but she does not know their titles. There is also a consultant team for the Canal Streetcar project working out of the department but they are not employees of the Employer. Ms. Philips does not know if any of the other employees in the department are Unit members.

Neither Ms. Philips nor the Quality Assurance Planner classification is mentioned in the Certification of Representative; however, the Capital Improvements Department is included. The Quality Assurance Planner position is not mentioned in the CBA. Ms. Philips has never been a member of the Unit.

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<sup>4</sup> I also note that Petitioner, in filing the petition to represent the Unit, specifically excluded employees in the Transit Operations Department.

Petitioner takes the position that Ms. Philips should be included in the Unit because, as a Quality Assurance Planner, she works with the Transit Planners, who are included in the Unit (Group B, the Professional Group). Petitioner also asserts that she no longer holds a managerial position but, instead, holds a position within the Capital Improvements Department, a department that is included in the Unit.

The Employer claims that Ms. Philips should be excluded from the Unit because her classification, Quality Assurance Planner, is not included in the Certification of Representative. I do not agree with the arguments of either party's position.

As noted above, an employee will be clarified into a bargaining unit if 1) the employee performs essentially the same function as Unit employees, or 2) shares a substantial community of interest with Unit employees. When determining if the new employee share a community of interest with the employees of an existing bargaining unit, the Board considers: the integration of operations; centralization of management and administrative control; geographical proximity; similarity of working conditions, skills, and functions; collective-bargaining history; and the interchange of employees. *Archer Daniels Midland Co.*, supra; *Silver Court Nursing Center, Inc.*, 313 NLRB 1141, 1142 (1994). The factors normally viewed as the most important are employee interchange and common day-to-day supervision. *Super Valu Stores*, 283 NLRB 134, 136 (1987).

The Quality Assurance Planner classification does not perform essentially the same functions as Unit positions. While Petitioner argued that Ms. Philips works with Transit Planners, there is no evidence that she performs the same function as the Transit Planners. There was no evidence presented as to what the Transit Planners do so a comparison is not possible. Finally, and most importantly, Ms. Philips testified that no one else performs the same functions as her.

The Quality Assurance Planner classification does not share a substantial community of interest with Unit positions. She testified that she rarely interacts with other employees of the Employer but interacts mostly with outside contractors. Also, while there was testimony as to the location of her office in comparison with Unit employees, Ms. Philips testified that she spends most of her time away from it. There was no other evidence concerning Ms. Philips' terms and conditions of employment so no further comparison is possible. Finally, Ms. Philips testified that she reports directly to James Baker, a person who is not even an employee of the Employer. Therefore, I find that Ms. Philips and the Quality Assurance Planner position are excluded from the Unit.

#### **4. Michael Czindula**

Purchasing Assistant Michael Czindula is included in the Unit. Mr. Czindula is employed as a Purchasing Assistant in the Small Purchases unit of the Procurement Department at the Employer's East New Orleans facility. Mr. Czindula started working for the Employer on November 8, 2002. While Mr. Czindula had a fourteen-year career with the Employer some time prior to 2002, he was not employed by the Employer at the time of the election in March of 2002. According to Mr. Czindula, when he was rehired in November of 2002, he replaced an employee named Geraldine Pierre (though the record does not indicate when her employment ended).

Mr. Czindula's job duties include: preparing purchasing documents; regularly maintaining a zero backlog on non-stock purchase requisitions, entering those requisitions in the log, and distributing and filing the relevant documents after they are complete; maintaining the purchase order files; compiling, sorting and transmitting outgoing procurement documents such as memos, letters, purchase orders, and requests for quotations. According to Mr. Czindula, there are no other clerical employees working with him; he claims to work mostly with the Purchasing Supervisor (Mary

Boazman) and the Buyer (Erskine Barbarin). According to Mr. Czindula, the Purchasing Supervisor is responsible for making forty-five percent of the purchases and the Buyer and Mr. Czindula are responsible, on a two-month rotating basis, for making the other fifty-five percent. According to Mr. Czindula's uncontested testimony, his job and the job of the Buyer are identical, except that Mr. Czindula processes more paperwork.

Neither Mr. Czindula nor the Purchasing Assistant classification is mentioned in the Certification of Representative, however, the Procurement Department is an included department. Also, according to the certification, both Mr. Barbarin and the Buyer classification are included in the Unit. While there was no evidence as to her job title, Ms. Pierre was expressly named as a member of the Unit in the Procurement Department. Finally, the Purchasing Assistant position was not mentioned in the CBA.

Petitioner maintains that Mr. Czindula should be included in the Unit. Petitioner asserts that the only reason he was not included in the Certification of Representative was because his position was vacant at the time of the election. The Employer claims that Mr. Czindula should not be included in the Unit because his position, Purchasing Assistant, is not included in the Unit. While I do not consider Petitioner's rationale regarding the reason Mr. Czindula was left out of the Unit, I agree with Petitioner that Mr. Czindula is included in the Unit.

As noted above, an employee will be clarified into a bargaining unit if 1) he performs essentially the same function as Unit employees, or 2) he shares a substantial community of interest with Unit employees. Mr. Czindula's unrefuted testimony was that he performs the same function as Mr. Barbarin, the buyer and an employee included in the Unit. Therefore, I find that the Purchasing Assistant position currently held by Mr. Czindula is included in the Unit.

## **5. Karen Barnes and Sylvia Haughton**

Karen Barnes, Recruiter, is excluded from the Unit because I find her to be a confidential employee. Senior Employment Recruiter Sylvia Haughton is excluded from the Unit because I find her to be a supervisor as defined by the Act. Karen Barnes is employed as a Recruiter in the Human Resources Department at the Employer's Plaza Drive facility. Ms. Barnes has had this job since April of 2002. Ms. Barnes has worked for the Employer since December of 1991, and immediately prior to being a Recruiter, Ms. Barnes was a Benefits Specialist III. While she testified that she was a Benefits Specialist III, Ms. Barnes acknowledged that the Certification of Representative described her as an Employment Specialist III, and that the two positions are different. Neither the witness nor the parties provided an explanation for the discrepancy. In any event, Ms. Barnes became a Recruiter in April of 2002 after applying for the open position. Her immediate supervisor is the Manager of the Human Resources Department.

In her position as Recruiter, Ms. Barnes recruits Transit Operators. Ms. Barnes receives the applications from prospective employees, screens them, arranges for and conducts testing, processes background checks (which are actually performed by an outside contractor), arranges interviews, arranges for medical and drug tests, and conducts orientations for those ultimately hired. Her office is located behind the Receptionist's desk, where the blank applications are distributed. She also

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<sup>5</sup> If Purchasing Assistant is a newly created position, the evidence shows that it performs the same functions as the Buyer and thus should be included. If not newly created, his position must have been the position held by Ms. Pierre and thus is included. While the record does not identify Ms. Pierre's job title, it is well established that job titles are not as important as job duties in determining whether a position is included in a unit, and Mr. Czindula testified that he performs the duties that Ms. Pierre performed before she left.

testified that she assists the head of the Human Resources Department in “assigning grade and steps for positions.” (Tr. 110)

Q. So you would recommend to him what grade or step somebody should be in?

A. Yes.

Q. Does he take your recommendation normally?

A. Well, we meet, we agree.

(Tr. 110) In doing this work, Ms. Barnes has access to confidential wage information. Finally, Ms. Barnes testified that either she or Katryna Ramirez (Human Resources Support Clerk, discussed *infra*) sign the letters notifying applicants that they will not be hired because they do not meet the employment criteria. As a Benefits Specialist III, Ms. Barnes claimed she handled matters dealing with life and health insurance, disability, and “anything that the company had to offer to employees who were going out with STD[s], whatever.” (Tr. 107)

According to Ms. Barnes, other positions in the Human Resources Department include another Recruiter, Benefits Specialists, Administrative Assistant, Drug and Alcohol Coordinator, and others totaling nine employees. According to Ms. Barnes, Sylvia Haughton occupies the other Recruiter position.

According to Ms. Haughton, she is employed as a Senior Employment Recruiter in the Human Resources Department at the Employer’s Plaza Drive facility. While Ms. Barnes is responsible for recruiting Transit Operators, Ms. Haughton is responsible for recruiting maintenance and administrative employees. She has held this position since 1995. Both Ms. Barnes and Ms. Haughton report directly to the Manager of the Human Resources Department.

Ms. Haughton is responsible for recruiting and staffing; she recruits, screens, interviews, recommends employment, and offers employment to candidates. In addition, she provides the executive staff with information concerning employment practices and procedures, salary structure, and job classification and grade levels to determine and evaluate staffing needs. One of the areas in which she provides information to department heads is the appropriate discipline for a given situation. She reaches her conclusions by interpreting various policies and procedures contained in employment manuals.

Ms. Haughton is a trustee of the pension plan board. The board oversees the investments of the pension plan (though the actual investment decisions are made by investment professionals). There are ten trustees, nine of whom are current employees and one retiree. Ms. Haughton represents the Human Resources Department. The other trustees include the General Manager, the Deputy General Manager, the Manager of the Procurement Department, and others (there is no evidence in the record as to who the other trustees are, or their job classifications). The trustees meet on the third Thursday of the month.

Finally, and most importantly, Ms. Haughton is responsible for hiring temporary employees. This is done through an employment agency; she calls the agency and tells them the requirements of the positions, length of the assignment, etc. In addition, she negotiates the hourly rate to be paid to the agency for the employees. When the candidates are sent to the Employer, Ms. Haughton has the final decision as to which is hired.

According to the Certification of Representative, the Human Resources Department is an included department and Benefits Specialist III is an included classification. However, Karen Barnes, described as an Employment Specialist III in the certification, is excluded by name from the Unit as a

confidential/managerial employee, even though elsewhere in the certification the Employment Specialist III position is listed as an included classification. Finally, the positions of Recruiter and Senior Employment Recruiter are not mentioned in the certification; however, Sylvia Haughton is named as an included employee and the classification of Employment Recruiter Specialist/Administration is listed as an included classification.

In its brief, Petitioner took the position that Ms. Barnes and Ms. Haughton should be included in the Unit because Ms. Barnes performs the same duties as Ms. Haughton, and the Employer, at the start of the hearing, conceded that Ms. Haughton should be included in the Unit. However, later in the hearing, the Employer indicated that it was changing its position regarding Ms. Haughton and asserted that she should be excluded from the Unit. During the hearing, however, Petitioner took the position that Ms. Barnes and Ms. Haughton should be included in the Unit because their classification, regardless of the title, was Employment Recruiting Specialist, a position included in the Unit.

The Employer asserts that Ms. Barnes should be excluded from the Unit because she is expressly excluded in the Certification of Representative. Citing *Robert Wood Johnson University*, 328 NLRB 912 (1999), the Employer argued that it is inappropriate to take evidence regarding Ms. Barnes because her position has historically been excluded; it does not matter whether the exclusion was due to agreement, oversight, mistake, or some other reason. *Id.* Alternatively, the Employer argued that Ms. Barnes should be excluded as a confidential employee because she is responsible for employee recruiting.

Karen Barnes is excluded from the Unit because she continues to be a confidential employee. It is appropriate to clarify a Unit during the term of a collective-bargaining agreement to exclude an employee if that classification of employee is excluded by law. *Kirkhill Rubber Company*, 306 NLRB 559 (1992). The Board has consistently excluded confidential employees from bargaining units. *B.F. Goodrich Company*, 115 NLRB 722, 724 (1956). A confidential employee is an employee who “assist[s] and act[s] in a confidential [relationship] to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *Id.* Ms. Barnes testified that she assists the Manager of the Human Resources Department in deciding the wage rates for transit operators. While the record is not clear as to the degree of Ms. Barnes’ responsibility or influence in establishing individual employee wage rates, the uncontradicted testimony is that she actively participates in the Employer’s effectuation of its wage policy. Therefore, Ms. Barnes is excluded from the Unit.

As to the Employer’s claim that Ms. Barnes should be excluded because she was specifically excluded from the Unit in the Certification of Representative, I note that she was excluded because of her previous position. Whether her previous position was Employment Specialist III or Benefits Specialist III, she no longer holds that position but now holds the position of Recruiter.

As for Ms. Haughton, the Employer argues that she should be excluded from the Unit because she is a confidential/managerial employee. I agree that Ms. Haughton should be excluded from the Unit but it is because she is a supervisor as defined in the Act.

Ms. Haughton is excluded from the Unit because she is a supervisor as defined by the Act. Section 2(11) of the Act defines a supervisor as someone who, among other things, has the authority to hire employees. Ms. Haughton testified that she is responsible for hiring temporary employees – specifically, that she is the person who decides who will be hired. Therefore, Ms. Haughton is excluded from the Unit because she is a supervisor as defined by the Act.

## **6. Katryna Ramirez**

The position held by Katryna Ramirez, Human Resources Support Clerk, is excluded from the Unit because the Petitioner has failed to show either that she performs essentially the same function as Unit employees or that she shares a substantial community of interest with Unit employees. Ms. Ramirez is employed as a Human Resources Support Clerk in the Human Resources Department at the Employer's Plaza Drive facility. She has held this position since April of 2002. Before April of 2002, Ms. Ramirez performed the same functions but as either a temporary or contract employee (the record is unclear which). Ms. Ramirez believes that no one filled the position of Human Resources Support Clerk until she was hired in April of 2002.

As a Human Resources Support Clerk, Ms. Ramirez helps process employment applications, tax forms, address changes and electronic deposits. Ms. Ramirez maintains the orientation package and maintains employment forms on the Internet and the Employer's intranet. She has access to confidential wage information. Also performing clerical duties in the Human Resources Department is the Administrative Assistant, Geraldine Perkins, who is located down the hall from Ms. Ramirez' office.

According to the Certification of Representative, the Human Resources Department is an included department, but neither Ms. Ramirez nor Human Resources Support Clerk is mentioned. Also, Ms. Perkins is included by name in the Unit but the position of Administrative Assistant is not mentioned. Finally, Human Resources Support Clerk is not mentioned in the CBA.

According to Petitioner, Ms. Ramirez should be included in the Unit because she is in a position similar to the included classifications of Department Secretary and Administrative Assistant, and she works in the Human Resources Department, an included department.

According to the Employer, Ms. Ramirez should be excluded from the Unit because her classification is not in the Certification of Representative and she has access to confidential information. While I do not agree with either of the Employer's arguments, I find that the position currently held by Ms. Ramirez is excluded from the Unit.

Ms. Ramirez is excluded from the Unit because the Petitioner has failed to show either that she performs essentially the same function as Unit employees or that she shares a substantial community of interest with them. The record does not contain detailed job descriptions of the various positions in the Human Resources Department so it is not possible to compare them to Ms. Ramirez' position. While I note that Group A of the Unit is described generally as a clerical unit and that Ms. Ramirez' duties are clerical in nature, this is not sufficient. In addition to "helping out" other employees in the Human Resources Department, Ms. Ramirez works closely with Ms. Barnes and Ms. Houghton but, as noted above, they are not members of the Unit. Therefore, I cannot include Ms. Ramirez in the Unit.

As for the Employer's assertion that Ms. Ramirez should be excluded because she has access to confidential information, Board law does not support the argument. The mere handling of, or access to, confidential business or labor relations information is insufficient to render an employee "confidential," as the Board has defined this term. *Ernst and Ernst National Warehouse*, 228 NLRB 590, 591 (1977). Instead, the Board looks not to the confidentiality of information within the employee's reach, but to the confidentiality of the relationship between the employee and persons who exercise managerial functions in the field of labor relations. *Id.* The category of confidential employees is limited to persons "who assist and act in a confidential [relationship] to persons who formulate, determine, and effectuate management policies in the field of labor relations." *B.F.*

*Goodrich Company*, 115 NLRB at 724. Ms. Ramirez testified that she had access to information that might be classified as confidential, however, there was no evidence that she “assist[s] or act[s] in a confidential [relationship] to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *Id.* Consequently, I do not find that Ms. Ramirez is a confidential employee. However, because I find that Ms. Ramirez does not perform essentially the same function as Unit employees, or share a sufficient community of interest with them, I find that she should be excluded from the Unit.

## **7. Gaynell M. Johnson**

The position currently held by Gaynell Johnson, Receptionist/Mail Distribution clerk, is included in the Unit. Ms. Johnson is employed as a “Receptionist/Mail Distribution” clerk in the Board of Commissioners Department at the Employer’s Plaza Drive facility. She works both in the mailroom and at the receptionist desk. Ms. Johnson has held this position since February of 2003; this is her first job with the Employer. According to Ms. Johnson, the person holding the position prior to her was Brandon Mason. The record does not indicate when Mr. Mason started at the position or what happened to him. Ms. Johnson is paid a salary.

In performing her Mail Clerk duties, Ms. Johnson travels to all of the Employer’s facilities around the city picking up and delivering mail, twice a day. She delivers the mail, and sorts and picks up mail to be delivered elsewhere (both U.S. mail and interoffice mail). According to Ms. Johnson, Elaine Allen performs the same functions as her, but that she is primarily the Mail Clerk and Ms. Allen is primarily the Receptionist. Generally, Ms. Johnson delivers the mail four days a week and Ms. Allen delivers the mail one day; when that happens, each performs the other’s duties. Both Ms. Allen and Ms. Johnson are supervised by the same person.

Ms. Johnson is not mentioned in the Certification of Representative. However, according to the certification, Ms. Allen is included in the Unit; moreover, the parties have stipulated that she is included in the Unit as a Receptionist. There is no mention of mail distribution in the certification. Also, there is no mention of Brandon Mason or the Board of Commissioners Department in the Certification of Representative. However, while the position is not mentioned in Article 2, the Recognition Clause, Article 15 of the collective-bargaining agreement lists Receptionist/Mail Distribution as a position covered by the agreement.

Petitioner asserts that Ms. Johnson should be included in the Unit because she “works as part of a tag team with Elaine Allen [and] Elaine Allen has always been part of the bargaining unit.”

The Employer asserts that Ms. Johnson should be excluded from the Unit because she is not included in the Certification of Representative and lacks a sufficient community of interest with Unit employees. The Employer argues that she lacks a sufficient community of interest because she spends a substantial amount of time away from her office. As for sharing a job with Ms. Allen, the Employer argues that she does this only when Ms. Allen is unavailable and it is not a regular part of her duties. I agree with Petitioner.

Ms. Johnson is included in the Unit because she performs essentially the same function as a Unit position, Receptionist, currently held by Ms. Allen. I find this to be so even though Ms. Johnson acknowledged that her work as Receptionist did not occur on a set schedule and that when asked if her performance of Receptionist work was in a “fill-in situation,” she answered in the affirmative. Other testimony of Ms. Johnson disputes the notion that Ms. Johnson’s work as a Receptionist is irregular and suggests that her work as a Receptionist is substantial and regular. Regarding the characterization of the work as a “fill-in situation,” Ms. Johnson’s work as Receptionist is not limited



to only those times when Ms. Allen is unavailable, but also when Ms. Allen works as the Mail Distribution Clerk (Ms. Johnson's regular position). When asked how often she works as a Receptionist, Ms. Johnson stated that she works one day a week "most of the time;" this amounts to roughly twenty percent of her time. (Tr. 164) When asked if she does the same work as Ms. Allen, Ms. Johnson answered in the affirmative. I also note that Ms. Johnson and Ms. Allen have the same immediate supervisor. Therefore, I find that the position currently held by Ms. Johnson performs the same work as the Receptionist, an included position, and is, therefore, included in the Unit.

## **8. Leah Ferrer**

The position of Lead Transit Analyst currently held by Leah Ferrer is included in the Unit. Ms. Ferrer is employed as a Lead Transit Analyst in the Schedule, Planning and Data Office of the Transit Operations Department at the Employer's Plaza Drive facility. According to Ms. Ferrer, the Schedule, Planning and Data office was created from the combination of two other offices (though the record is not clear which offices or departments were combined). At the time of the election in March of 2002, Ms. Ferrer was employed as a General Ledger Accountant. According to Ms. Ferrer, the Lead Transit Analyst title is new but the person who performed the functions of Lead Transit Analyst before her was Mitchell Guidry who, at the time, worked in the Budget Department. Mr. Guidry is now the Director of Schedule, Planning and Data.

As a Lead Transit Analyst, Ms. Ferrer's responsibilities include compiling transit data regarding ridership, revenue, miles, and hours, etc. The data is compiled and placed in reports on a weekly, monthly, quarterly or annual basis. The reports are read both by outside governmental agencies and internal management. Working with Ms. Ferrer are four other employees: three Schedulers and Planners (Brenda Martin, Willie Altman, and an employee named Vic – last name unknown), and Willie Brown, GFI Analyst. Ms. Ferrer works most closely with Mr. Brown. According to Ms. Ferrer, while she does not have the authority to discipline or evaluate the work of Mr. Brown, she has the authority to assign work to Mr. Brown if there is a special project (as did Mr. Guidry when he held the position before her).

According to the Certification of Representative, Ms. Ferrer was included in the Unit when she was in the Accounting Department and Mr. Guidry was included in the Unit working in the Budget Department. When Ms. Ferrer applied for the position of Lead Transit Analyst, she was told that the position was not in the Unit (though not given a reason why). The Transit Operations Department is not mentioned in the Certification of Representative. According to the parties, the Schedulers and Planners are represented by the Amalgamated Transit Union.

Petitioner takes the position that Ms. Ferrer should be included in the Unit because she performs the same function as Mitch Guidry when he was included in the Unit (regardless of the change in title).

The Employer takes the position that Ms. Ferrer should be excluded from the Unit because she is not included in the Certification of Representative and/or she is a supervisory employee. I agree with Petitioner.

Ms. Ferrer is included in the Unit. The position Ms. Ferrer holds, regardless of the change in title or department, was the same position held by Guidry and was included in the Unit. Consequently, Ms. Ferrer, as well as the duties performed by the Lead Transit Analyst, is included in the Unit.

As to the Employer's argument that the Lead Transit Analyst position is part of the Transit Operations Department and that department is excluded, I find this to be irrelevant. The Employer cannot simply transfer Unit work out of the Unit and then redefine the Unit.<sup>6</sup> As to the Employer's claim that Ms. Ferrer is a supervisor, the evidence is not sufficient to conclude that she is a supervisor as that term is used in the Act. Therefore, I find that Ms. Ferrer, as the Lead Transit Analyst, is included in the Unit.

## **9. Barbara Wheat**

Office Manager Barbara Wheat is excluded from the Unit because she is a confidential employee. Ms. Wheat is employed as an Office Manager in the Maintenance Department (Penske Contract Management) at the Employer's East New Orleans facility. She works for the Director of Maintenance. Prior to November of 2002, Ms. Wheat was the Penske Project Coordinator but, in November of 2002, the position was eliminated and she was made an Administrator (from November of 2002 until May of 2003). In May of 2003, her position was changed to Office Manager, her current position. According to Ms. Wheat, her job duties have not changed during the process.

However, also according to Ms. Wheat, as an Office Manager she is responsible for assisting the Director of Maintenance in addition to her duties regarding the Penske contract. Penske is the contractor that maintains the buses at the Canal Street facility. Regarding that contract, Ms. Wheat's duties included gathering statistical information on each vehicle (mileage, for example), making adjustments to bills based on that information, and compiling the information in a report to management for approval of payment. As part of her responsibilities as Office Manager, Ms. Wheat testified that, in addition to typical secretarial duties, she assists the Director of Maintenance with the processing of grievances.<sup>7</sup> Ms. Wheat reviews and edits grievance documents, including the Employer's step two responses before they are sent to the Union. On two occasions recently, and probably in the near future, Ms. Wheat sat in on grievance meetings taking notes. Also on those occasions, instead of merely editing the director's response, Ms. Wheat composed it for the director's approval (after being told of his decision).

Also, according to Ms. Wheat, as Office Manager, an employee named Ron Fogerty, Coordinator of Office Services, reports to her. However, this takes the form of her signing his time sheets and relaying vacation/sick leave requests. Mr. Fogerty's direct supervisor is the Director of Maintenance. Ms. Wheat does not evaluate his work or effectively assign work, and she does not have the authority to discipline him. According to Ms. Wheat, "I don't see his work, I don't supervise his work, I don't edit his work, and half the time I don't know what he's doing." (Tr. 204) On the other hand, she testified that if his work is not done, "somebody calls me up to rag on me, and then I'll do it, but I mean, that's about it." (Tr. 204)

According to the Certification of Representative, Ms. Wheat is included in the Unit, as is the Maintenance (Penske Contract Management) Department.

Petitioner claims that Ms. Wheat should be included in the Unit because she was originally included in the Unit and that her job duties have not changed since then, despite the changes to her title. Petitioner asserts that all of her duties are "secretarial" in nature and that she was named "secretary of the year" last year.

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<sup>6</sup> See Montgomery Ward, 195 NLRB 1031 (1972).

<sup>7</sup> The grievances that the Director of Maintenance handles are those filed by members of a unit represented by the International Brotherhood of Electrical Workers.

The Employer asserts that Ms. Wheat should be excluded from the Unit because her position, Office Manager, is not included in the Unit, that she is a confidential/managerial employee, and/or that she lacks a sufficient community of interest with Unit employees. I agree with the Employer.

Ms. Wheat is excluded from the Unit because she is now a confidential employee. It is appropriate to clarify a Unit during the term of a collective-bargaining agreement to exclude an employee if that classification of employee is excluded by law. *Kirkhill Rubber Company*, 306 NLRB 559 (1992). The Board has consistently excluded confidential employees from bargaining units. *B.F. Goodrich Company*, 115 NLRB 722, 724 (1956). A confidential employee is an employee who “assist[s] and act[s] in a confidential [relationship] to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *Id.* As Office Manager, among Ms. Wheat’s new duties is assisting the Director of Maintenance with grievance matters. In *Firestone Synthetic Latex Company*, 201 NLRB 347 (1973), the Board found four employees to be confidential employees because they assisted management officials with grievance documents. Similarly, I find that Ms. Wheat is a confidential employee. Ms. Wheat testified that she assists the Director of Maintenance with grievances. She testified that she either edits or composes the director’s responses to grievances (as well as other documents) before they are released to the union. In doing so, Ms. Wheat is privy to the secret thoughts of management officials that might not ultimately be revealed to the union. Therefore, because Ms. Wheat’s duties now include assisting a management official with the processing of grievances, the position of Office Manager currently held by Ms. Wheat is now a confidential position and Ms. Wheat is excluded from the Unit.<sup>8</sup>

#### **10. Glenda Johnson**

Revenue Agent Glenda Johnson is included in the Unit because the work that she performs, under its former title, is an included position in the CBA. Ms. Johnson is employed as a Revenue Agent in the Treasury Department at the Employer’s Plaza Drive facility (though she spends ninety percent of her time in the field). Ms. Johnson held this position for about one year (the record is not more specific). Prior to being a Revenue Agent, and at the time of the election, Ms. Johnson was a Marketing Representative (Sales Representative) in the Sales and Marketing Department. In that position, she performed the same duties she performs now as a Revenue Agent.

Ms. Johnson’s responsibilities are to deliver FTA monthly trans passes, one-and three-day visitor passes, and tokens to various vendors in the New Orleans area. She collects the money and the old passes at that time. She is also responsible for all of the paperwork (invoices, etc.). Upon returning to the office, she turns the money over to the Accounting Department.

According to the Certification of Representative, Ms. Johnson was allowed to vote subject to challenge. Among the departments included in the Unit is a department described as Marketing/Sales (Communications/Marketing). Neither the Treasury Department nor Revenue Agent is mentioned in the certification, however, the description of the Unit in Article 2 of the CBA includes the position of “Marketing Representatives (Sales Representatives/Transit Products).”

Petitioner asserts that Ms. Johnson should be included because “nothing in her testimony indicated that she was not part of the community of interest and a legitimate member of the bargaining unit.” The Employer asserts that Ms. Johnson should be excluded because she is a Revenue Agent in the Treasury Department, neither of which is included in the Unit. I do not agree with either party’s position but I find that Johnson’s position is included in the Unit.

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<sup>8</sup> Unlike with Ms. Ferrer, *supra*, I make no finding that the Employer has transferred Unit work outside of the Unit.

Ms. Johnson, as a Treasury Agent, is included in the Unit because the position, formerly titled Marketing Representative (Sales Representatives/Transit Products), is listed as an included position in the CBA. In making this decision, I noted that, at the time of the election, the parties could not agree whether Ms. Johnson should be included in the Unit but was allowed to vote subject to challenge. When the parties are unable to resolve the status of an employee who votes subject to challenge, a petition to clarify the unit is the appropriate course of action. See, e.g. *Niagara University*, 27 NLRB 313 (1976), and *D'Youville College*, 225 NLRB 792 (1976). However, in this case, I find that the parties have already come to an agreement as to Ms. Johnson's status, and have agreed that she is included in the Unit. While the Certification of Representative does not mention Ms. Johnson's position, the collective-bargaining agreement includes the position of Marketing Representative/Sales Representative (Transit Products) in the bargaining unit, the position held by Ms. Johnson at the time of the election. So, before Ms. Johnson's position was renamed and moved to the Treasury Department, she was included in the Unit as a Sales Representative. As noted above with Ms. Ferrer, the Employer cannot simply transfer Unit work outside of the Unit. Therefore, I find that Ms. Johnson, as a Treasury Agent, is included in the Unit.

#### **11. Caramitter Carter**

Disability Specialist Caramitter Carter is included in the Unit because she performs essentially the same function as Unit members. Ms. Carter is employed as a Disability Specialist in the Human Resources Department at the Employer's Plaza Drive facility. Ms. Carter has been a Disability Specialist since May of 2002. From 1995 until December of 2001,<sup>9</sup> Ms. Carter was a Benefits Specialist III. From December of 2001 until March of 2002, Ms. Carter was an HR Generalist (the record is not more specific as to the date). From March of 2002 until May of 2002, Ms. Carter was an Employment Development Coordinator. In May of 2002, Ms. Carter assumed her current position, Disability Specialist. She reports directly to the Director of Human Resources.

Ms. Carter is "in charge of all the company's disabilities plans... meaning administering the long-term disability, the short-term disability, handle the Medicare reimbursements for our retirees, handling the debt claims, as well as also handling the daily functions of the benefit area of" the Employer. (Tr. 278) Once invoices have been processed, she submits them to the Director of Human Resources for his signature. According to Ms. Carter, the "disability portion" of her position was previously performed by Karen Barnes; the "benefits portion" of her duties was previously performed by an employee who has since resigned (the record is unclear when). According to Ms. Carter, she works with Nicole McGowan, Benefits Specialist III.

According to the Certification of Representative, Ms. Carter was included in the Unit in the Human Resources Department. Also included in the Unit, in the same department, is Ms. McGowan. There is no mention of a Disability Specialist or HR Generalist. The CBA does not mention Disability Specialist.

Petitioner claims that Ms. Carter should be included in the Unit because, as a member of the Human Resources Department, she has always been a member of the Unit. Her duties have not changed from when she was in the Unit so she should continue to be part of the Unit.

The Employer claims that Ms. Carter should be excluded because her position is not included in the Certification of Representative and/or her position is confidential/managerial. The Employer

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<sup>9</sup> The record indicates the year 2004 but logic dictates that the year must be 2001 or earlier.

points out that some of Ms. Carter's duties were transferred from Karen Barnes who had been excluded as a confidential employee. I agree with the Petitioner.

Ms. Carter is included in the Unit because she performs essentially the same function as a Unit position, Benefits Specialist. Ms. Carter's duties consist primarily of filling out certain forms and making sure that other forms are filled out correctly by the Employer's employees. While she may be the only employee who performs this function with regard to disability insurance, she is not the only employee who processes forms pertaining to the Employer's employees. Benefits Specialists, who are also in the Human Resources Department, perform a similar function, but with regard to various types of insurance. Accordingly, I find that Ms. Carter, as a Disability Specialist, performs essentially the same function as the Benefits Specialists and is included in the Unit.

As to the Employer's assertion that Ms. Carter is a confidential employee, the assertion is not convincing. The Employer's argument is twofold: 1) that Ms. Carter has access to confidential information, and 2) that some of Ms. Carter's duties were transferred from an employee who was a confidential employee, making Ms. Carter a confidential employee. Both arguments are unpersuasive. First, while Ms. Carter may have access to confidential information, nothing in Ms. Carter's job description indicates a confidential relationship with persons who exercise managerial functions in the field of labor relations. See *B.F. Goodrich Company*, 115 NLRB at 724. Second, while Ms. Barnes was a confidential employee, nothing in the record suggests that the duties that made Ms. Barnes a confidential employee were the duties that were transferred to Ms. Carter. Therefore, Disability Specialist Carter is not a confidential employee and is included in the Unit.

## **12. Anita Jefferson**

Although Manager of Quality Assurance Anita Jefferson's position was in existence at the time of the signing of the Side Agreement, it is inappropriate to clarify the Unit with regard to Ms. Jefferson. Ms. Jefferson is employed as Manager of Quality Assurance at the Employer's Canal Street facility (the record does not indicate which department she works in). Until January 1, 2004, Ms. Jefferson was located at the Employer's East New Orleans facility. She answers directly to the General Manager. Prior to being Manager of Quality Assurance, Ms. Jefferson was the Director of Human Resources and the Manager of Special Events. Ms. Jefferson does not consider any of these changes in her job to be promotions.

According to Ms. Jefferson, her job has nothing to do with quality assurance. According to Ms. Jefferson, she is in charge of promotional activities for the benefit of the Employer's employees (tickets to basketball games at a group rate, for example). She investigates the employees' interest in such activities and makes the necessary arrangements. The record suggests that she has had these duties since 1996. Also, Ms. Jefferson was responsible for the 2003 United Way campaign and the employee satisfaction survey some time in early 2002 (before the March 2002 election). At one time, until November of 2002, Ms. Jefferson, as the Manager of Quality Assurance, was the supervisor of the two "mystery riders," employees who covertly monitor the Employer's operations. While the mystery rider program continues, Ms. Jefferson's involvement with it does not.

According to the Certification of Representative, at the time of the election in March of 2002, Ms. Jefferson was the Manager of Marketing and was specifically excluded from the Unit because she was a confidential/managerial employee. However, according to Ms. Jefferson, she has never been the Manager of Marketing and does not know why she was described as such in the certification. Ms. Jefferson claims that she had applied for the Manager of Marketing position on several occasions but did not get it; she said that the position has recently been filled by a person named Beth (last name

unknown). Manager of Quality Assurance is not mentioned in the certification. Manager of Quality Assurance is not mentioned in the CBA.

Petitioner asserts that Ms. Jefferson should be included in the Unit because “nothing in her testimony indicated that in recent years she was supervisory, managerial, or in any way outside the scope of the certified SEIU bargaining unit.” Also, Petitioner asserts that Ms. Jefferson was misclassified as Manager of Marketing and that “Ms. Jefferson’s job title in quality assurance, we believe, is consistent with job titles that include program sales coordinators and things of that nature. I don’t know how to describe her job other than that.” (Tr. 200)

The Employer, citing *Robert Wood Johnson University Hospital*, 328 NLRB at 913-14, claims that evidence should not be taken on Ms. Jefferson because she was stipulated as being excluded from the Unit; this would be true even if the exclusion were due to oversight, mistake or some other reason. In the alternative, the Employer claims that Ms. Jefferson lacks a sufficient community of interest with members of the Unit. I agree with the Employer.

It is inappropriate to clarify the Unit with regard to Ms. Jefferson because she has been historically excluded from the Unit and the evidence does not show that the job duties warranting her exclusion have changed. A unit-clarification petition seeking to include a classification historically excluded from the Unit raises a question of representation, which can only be resolved through an election. *Robert Wood Johnson University Hospital*, 328 NLRB at 914. Regardless of her job title at the time of the certification, Ms. Jefferson was specifically excluded from the Unit by name as a confidential employee. While clarification would be appropriate if there has been a change in the duties that warranted her exclusion as a confidential employee, the record does not indicate what these job duties were. While the evidence indicates that she no longer “supervises” the mystery riders, the evidence does not indicate that these were the duties that rendered her a confidential employee.<sup>10</sup> Without evidence as to what circumstances led to her exclusion as a confidential employee, it is not possible to conclude that those circumstances have changed. Petitioner asserts that there is nothing in Ms. Jefferson’s duties that would exclude her from the Unit; however, while that might have been sufficient to include her in the Unit originally, that is not the standard in a unit clarification petition. *Id.* at 913.

As to Petitioner’s assertion that Ms. Jefferson was misclassified as Manager of Marketing and should thus now be included, Board law does not agree. The weight of the evidence indicates that Ms. Jefferson was not the Manager of Marketing, but rather the Manager of Quality Assurance, at the time of the election. However, the relevant inquiry is into the duties of a position, not its title. Regardless of the title with which she was described at the time of the certification, as noted above, there is no evidence of a substantial change in her job duties. While Petitioner asserts that Ms. Jefferson was mistakenly excluded because she was mistakenly classified as Manager of Marketing, it is equally possible that Ms. Jefferson was properly excluded, based on her job duties, and then mistakenly described as Manager of Marketing. Without evidence as to what circumstances led to her exclusion, it is not possible to conclude that those circumstances have changed. Because Ms. Jefferson was excluded from the Unit by name, and because her job duties have not substantially changed since the time of the certification, it is not appropriate to clarify the Unit with regard to Ms. Jefferson.

### **C. Positions That Did Not Exist at the Time of the Signing of the Side Agreement or**

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<sup>10</sup> I also note that the record does not contain sufficient evidence for me to conclude that she was a supervisor as that term is used in the Act. In addition, I note that the Certification of Representative excludes her as a confidential/managerial employee, not as a supervisory employee.

### **the CBA on June 19, 2003**

The following positions did not exist at the time of the signing of the Side Agreement or the CBA on June 19, 2003. However, as explained more fully below, I find that they are excluded from the Unit.

#### **1. Pamela Pratt**

Administrative Assistant II Pamela H. Pratt is excluded from the Unit because she does not perform essentially the same function and does not share a sufficient community of interest with Unit employees. Ms. Pratt is employed as an Administrative Assistant II in the Assessments Office of the ADA Compliance Office at the Employer's Plaza Drive facility. The ADA Compliance Office ensures that the Employer's operations, with regard to disabled riders (or "clients"), are in compliance with the requirements of the Americans with Disabilities Act. Prior to March of 2002, Ms. Pratt was a Contract Expediter. From March of 2002 (sometime before the election but the record is not more clear) until October of 2002, Ms. Pratt was an Executive Assistant, working for the Vice President of Operations. In October of 2002, when there was a change in the organizational structure of the Employer, Ms. Pratt was made an Administrative Assistant II and placed in a clerical pool. In July of 2003, Ms. Pratt was transferred from the clerical pool and assigned to the Assessments Office of the ADA Compliance Office, her current position. According to Ms. Pratt, the creation of the ADA Compliance Office was legally mandated. The record suggests that it might have been in response to the settlement of a lawsuit. In any event, according to Ms. Pratt, the ADA Compliance Office and her position were newly created in July of 2003 when she was assigned to it.

Ms. Pratt's job duties consist of receiving applications from prospective clients, reviewing them for completeness, and scheduling both new and existing clients for assessments as to their eligibility for participation in the Employer's program for those with special transportation needs. She works with two other individuals, a physical therapist and a physical therapist assistant, who are contract employees of the Employer. She remains in contact with the clients throughout the assessment process by telephone and by mail. Ms. Pratt also speaks with dispatchers who assign drivers to pick up prospective clients and bring them to the Plaza Drive facility for assessments. She also oversees activities in the parking lot of the facility so that the prospective clients are accommodated efficiently. Ms. Pratt initially receives the applications through interoffice mail from the Canal Street office where Mildred Wells (ADA Intake Clerk), Mary Jones (a contract employee) and Terri Johnson (ID Center Supervisor) work.

According to Ms. Pratt, she would have been eligible to vote in the election in March of 2002 as a Contract Expediter, but when she was made an Executive Assistant she was considered a confidential employee of the Vice President of Operations and was not allowed to vote.

Petitioner asserts that Ms. Pratt should be included in the Unit because "[a]ll other admin assistants are in the unit – the only distinguishing situation seems to have been that she is now working to deal with issues raised by the ADA settlement, which occurred after the election." Petitioner argues that the ADA Compliance Office was newly created after the election and that the office was originally staffed with individuals who were in the Unit. Petitioner also argues that the employees of the ADA Compliance Office work closely with similarly situated employees in the Human Resources Department.

The Employer claims, citing *Robert Wood Johnson University Hospital*, 328 NLRB at 912, that it would be inappropriate to take evidence concerning Ms. Pratt because she was specifically excluded as a confidential employee. In the alternative, the Employer claims that Ms. Pratt should be

excluded because she is not an Administrative Assistant II as she claims, but “does something totally different... in assessments, which is in the ADA Department.”

Ms. Pratt is excluded from the Unit because Petitioner failed to show that she performs essentially the same function as, or shares a sufficient community of interest with, Unit members. Both parties and the witnesses assert that the ADA Compliance Office was newly created in June of 2003. However, the evidence is unclear as to where in the Employer’s organizational structure the office is situated and where its original employees came from. Petitioner’s assertion that the office was originally staffed by employees who were in the Unit is refuted by the fact that none of the six individuals known to be working in the office were ever members of the Unit. Because the office is new, and because none of the classifications are to be found in the Certification of Representative, Petitioner must show that the new position performs essentially the same function as current Unit members or that there is a substantial community of interest with current Unit members. See *Towne Ford Sales*, 270 NLRB at 311-12, *Premcor, Inc.*, 333 NLRB at 1366, and *Robert Wood Johnson University Hospital*, 328 NLRB at 914. Petitioner has failed to do either.

Petitioner has not shown that Ms. Pratt’s position performs the same functions as current Unit members. While the record does not contain job descriptions of the classifications included in the Unit, I note that Group A of the Unit is described generally as a clerical unit. However, while Ms. Pratt performs clerical work in the sense that she processes forms as part of her job, processing paperwork is not the purpose of her position. Ms. Pratt functions more in the area of public relations and I take particular note of the fact that none of the Unit positions interact with the public the way Ms. Pratt does. While it might be reasonable to include Ms. Pratt in a similar Unit at its initial formation, the standard to be followed now is whether the position performs essentially the same function as Unit members, and I find that it does not. See *Robert Wood Johnson University Hospital*, 328 NLRB at 913.

Petitioner also has not shown that Ms. Pratt’s position shares a substantial community of interest with current Unit members. While there is little evidence as to the terms and conditions of employment for Ms. Pratt, I note that Ms. Pratt is not in the same supervisor hierarchy as other Unit members. Unlike the Unit members, Ms. Pratt is supervised by the Manager of the ADA Compliance Office, who reports directly to the General Manager. Unit members have a multi-tiered supervisory structure. I also note that Ms. Pratt does not work closely with Unit members. Consequently, I find that the Administrative Assistant II position currently held by Ms. Pratt does not share a substantial community of interest with the Unit to clarify the Unit to include her at this time. Therefore, Ms. Pratt is excluded from the Unit.

## **2. Mildred Wells**

Mildred Wells is excluded from the Unit because she does not perform essentially the same function as a Unit position and does not share a community of interest with the Unit. According to Mildred Wells, she is employed in the ID Center of the ADA Compliance Office at the Employer’s Canal Street facility. As for her position in that office, the record is unclear. According to Ms. Wells, “I was told initially my job title is ADA Eligibility Outreach Coordinator, but recently I was told and it was stated that my job title is Intake – Intake Clerk, which I have no idea what that job description consists of.” (Tr. 240) Before working for the ADA Compliance Office, Ms. Wells worked in the Legal Department in litigation support as a Claims Clerk until October of 2002.

In her position in the ADA Compliance Office, Ms. Wells receives and screens applications from members of the public for their eligibility to participate in the Employer’s program for special transportation accommodations. Once the applications have been processed, and the assessments



performed, Ms. Wells is the employee who informs the applicant of the results, but she does not make the decisions. In performing her job, she is in daily communication with employees in the Assessments office (such as Pamela Pratt). She also coordinates with the Jefferson Parish Transit Service, as well as other out-of-town ADA offices, to provide Para transit services to those visitors to the city needing them. According to Ms. Wells, she works with, and performs duties similar to, Mary Jones (a contract employee) and Terri Johnson (ID Center Supervisor).

Neither ADA Intake Clerk nor ADA Eligibility Outreach Coordinator is mentioned in the Certification of Representative; however, the ADA Liaison Department is listed as an included department. On the other hand, Ms. Wells was specifically excluded from the Unit as a Claims Clerk because she was a confidential/managerial employee; while the certification does not name which department she was working in, according to Ms. Wells she worked in the Legal Affairs Department until October of 2002. The parties agreed on the record that Ms. Jones is excluded because she is a contract employee and Ms. Johnson is excluded because she is a Supervisor.

Petitioner claims that Ms. Wells should be included in the Unit because she works in a newly created position and there was nothing in her testimony indicating that she should not be in the Unit. The Employer claims that Ms. Wells should be excluded because she was specifically excluded as a confidential employee and because her classification is not included in the Unit. However, for the same reasons as Ms. Pratt, I find that Ms. Wells is excluded from the Unit.

#### **D. Employees Who Did Not Testify**

Petitioner presented no evidence regarding the following employees and thus, I am dismissing the petition in regard to these employees: Donald Hyde, Wanda Moret, and Denise D. Nicholl.

Also, Petitioner presented no evidence regarding the following positions and thus, I am dismissing the petition in regard to these positions: Contract Administrator, Products Expediter, Contract Expediter, "ADA ?," and Treasury Assistant.

#### **V. Conclusion**

I find that Petitioner timely filed the petition to clarify the Unit. I find that the substance of the sidebar negotiations and the Side Agreement signed on June 19, 2003, between Brown and Rathke, acted as an implicit reservation of the Union's right to petition to clarify the Unit regarding any position in existence at that time. Accordingly, I am clarifying the Unit in the following manner.

I am clarifying the Unit to include the following employees: Michael Czindula, Gaynell Johnson, Leah Ferrer, Glenda Johnson and Caramitter Carter.

I am clarifying the Unit to exclude the following employees: Stephanie Carson, Railynn Holmes, Delores Joseph, Barbara Philips, Karen Barnes, Syliva Houghton, Katryna Ramirez, Barbara Wheat, Pamela Pratt and Mildred Wells.

I am dismissing the petition regarding Anita Jefferson because she has historically been excluded from the Unit, and clarification would be inappropriate.

I am also dismissing the petition regarding the following employees because Petitioner did not produce evidence regarding them: Donald Hyde, Wanda Moret, and Denise D. Nicholl.

## **ORDER**

**IT IS HEREBY ORDERED** that Michael Czindula, Gaynell Johnson, Leah Ferrer, Glenda Johnson and Caramitter Carter are included in the Unit.

**IT IS FURTHER ORDERED** that Stephanie Carson, Railynn Holmes, Delores Joseph, Barbara Philips, Karen Barnes, Syliva Haughton, Katryna Ramirez, Barbara Wheat, Pamela Pratt and Mildred Wells are excluded from the Unit.

## **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington, D.C., by May 28, 2004.

**SIGNED AND DATED** at New Orleans, Louisiana on this 14th day of May, 2004.

"/s/ [M. Kathleen McKinney]"

**M. Kathleen McKinney**  
Acting Regional Director  
National Labor Relations Board  
Region 15